APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 7 provides:

> § 7. Special maritime and territorial jurisdiction of the United States defined.
>
> The term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:
>
> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United

States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any State, Territory, District or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. § 1111 provides:

§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special Maritime and territorial jurisdiction of the United States.

Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

18 U.S.C. § 1112 provides:

§ 1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States.

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 1114 provides:

§ 1114. Protection of officers and employees of the United States

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, or any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of

Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employees of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare designated by the Secretary of Health, Education, and Welfare to conduct investigations or inspections under the Federal Food, Drug, and Cosmetic Act while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division
Criminal No. 414-71-A

UNITED STATES OF AMERICA

v.

ALFRED ERDOS

Order

Upon consideration of the evidence and exhibits tendered, the briefs and authorities cited therein, and argument of counsel, the Court is of the opinion that the defendant's motion to dismiss count one of the indictment [1] on the grounds that this Court lacks both jurisdiction and venue, ought to be denied, and

IT IS SO ORDERED.

Count one charges the defendant with premeditated murder within the United States Embassy at Santa Isabel, Equatorial Guinea, in violation of 18 U.S.C. § 1111.

Congress has expressly extended its prohibition of the crime of murder to the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1111(b).

This includes:

> "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . ." 18 U.S.C. § 7(3).

The American Embassy at Santa Isabel, Equatorial Guinea, is on lands reserved or acquired for the use of the United States, and the Court so finds—The alleged murder occurred within the confines of that Embassy. (See stipulation.)

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[1] Count two was dismissed by the United States in open court.

Had Congress intended to limit the jurisdiction of the United States district courts in such cases to the continental limits of the United States—as the defendant urges—jurisdiction in § 1111 cases would not have been extended to include acts occurring within the special maritime and territorial jurisdiction of the United States.

Viewed from another angle, this Court has jurisdiction under the protective principle.

That principle, one of the five bases of jurisdiction with respect to the enforcement of criminal laws, provides that a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

The alleged murder here clearly interfered with the foreign affairs of the United States and its diplomatic relations with Equatorial Guinea, and the Court so finds—In fact, the United States Embassy at Santa Isabel ceased functioning for a substantial period of time as a direct result thereof.

There is also considerable authority that this Court could assume jurisdiction under the nationality principle even if the alleged murder did not take place within the confines of the United States Embassy—which is a part of territory of the United States.

This principle was discussed by the Supreme Court of the United States in Skiriotes v. Florida, 313 U.S. 69 (1941), wherein it is stated:

> ". . . [T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or

> other nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government . . . ."

The accused and the victim here were both American citizens. The crime occurred in an American Embassy located on lands acquired for the use of the United States (here leased land). The defendant was a United States diplomat accredited to Equatorial Guinea—As such he possessed diplomatic immunity from prosecution by the Equatorial Guinea authorities. The defendant was not arrested in Equatorial Guinea—To the contrary, he was allowed to leave that country.

International law recognizes that the United States has responsibility for criminal jurisdiction over the defendant in this case.

> "Jurisdictional immunity remains as a universally recognized principal incorporated into the body of international law which civilized nations accept as binding through custom, municipal legislation, and judicial decisions . . . . However, diplomats do not escape the jurisdiction of the courts of their home state. It would appear as if they remain domiciled on the territory of the sending state in matters of civil and criminal jurisdiction." See Wilson, Diplomatic Privileges and Immunities, 32 (Univ. Arizona Press, 1967).

The Vienna Convention on Diplomatic Relations codified the foregoing recognized principle. See Article 31(1) and (4).

> (1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.

* * * * * *

(4) The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

Thus, the responsibility and authority of the United States to prosecute its diplomats for crimes committed abroad, and especially those committed in its embassies and consulates, rest not only under 18 U.S.C. § 1111 but also under the internationally recognized protective and nationalistic principles of law.

Venue in this court is claimed on the ground the defendant was first found after the offense in the Alexandria Division of this court. 18 U.S.C. § 3238.

It is clear from the evidence presented that the defendant voluntarily returned to the United States after the date of the alleged murder—He was first found in the Alexandria Division of this court prior to the return of this indictment—The complaint was served upon him when he debarked from the airplane that brought him from Europe[2] to Dulles International Airport—Dulles is within the territorial confines of the Alexandria Division of the Eastern District of Virginia, and the Court so finds.

This case will proceed to trial as scheduled, beginning at 10:00 a.m. on February 28, 1972.

The Clerk will send a copy of this order to the United States Attorney for this District and to the attorney of record for the defendant.

/s/ Oren R. Lewis
United States District Judge

January 27, 1972

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[2] He flew from Equatorial Guinea to Europe on private and commercial airplanes with several stops en route.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1328

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFRED ERDOS, *Appellant*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge

Argued October 30, 1972
Decided February 14, 1973

Before HAYNSWORTH, *Chief Judge*, CRAVEN and WIDENER, Circuit Judges

William E. McDaniels and Aubrey M. Daniel, III, (Williams, Connolly and Califano on brief) for Appellant; Justin W. Williams, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

CRAVEN, Circuit Judge:

On August 30, 1971, in the American Embassy in the new Republic of Equatorial Guinea, Alfred Erdos killed Donald Leahy. Both were American citizens and embassy employees, with Erdos occupying the position of senior diplomat or charge d'affairs.

Returned to the United States, Erdos was tried and convicted of voluntary manslaughter[1] in the District Court

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[1] 18 U.S.C. § 1112 provides:

"(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful

for the Eastern District of Virginia. On appeal, the more important issues raised are whether the district court:

(1) had jurisdiction to try Erdos for a crime occurring within an American embassy located in a foreign country; (2) erred in holding that venue lay in the Eastern District of Virginia rather than the District of Massachusetts where the plane bearing Erdos first landed; and (3) improperly curtailed the cross-examination of a psychiatrist from a psychiatric treatise. We conclude there was jurisdiction and venue, and that the district judge's error in curtailing cross-examination was not sufficiently prejudicial to require reversal. We have also considered the other 13 assigned points of error and find them to be without merit. Accordingly, the judgment below will be affirmed.

Jurisdiction

The district court based jurisdiction upon 18 U.S.C. § 7, which provides in part:

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
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> * * * * * * * * *
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, *or* any place purchased or otherwise acquired by the United States by consent of the

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manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

> legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. [Emphasis added].

The power of Congress to lawfully proscribe the killing of an American citizen by another American citizen within a diplomatic compound located in a foreign country is, we think, beyond question. U.S. Const. art III, § 2; *United States* v. *Flores*, 289 U.S. 137, 146-47 (1933); *United States* v. *Bowman*, 260 U.S. 94, 96-98 (1922). The problem is not one of power but of intention, *i.e.*, statutory construction. Erdos contends that the district court lacked jurisdiction to try him for an offense committed outside the territorial limits of the United States because Congress has not exercised its constitutional power so as to extend American criminal court jurisdiction to the United States Embassy in Equatorial Guinea. It is urged that 18 U.S.C. § 7(3) must be read to apply only to areas within the geographical boundaries of the United States and may not be given extraterritorial effect.

The embassy in question is leased by the United States from a private citizen of the new Republic of Equatorial Guinea. This lease agreement does not itself defeat criminal jurisdiction, however, since fee simple "ownership" of the property by the United States is not a prerequisite to such jurisdiction. As the court in *United States* v. *Archer*, 51 F. Supp. 708 (S.D. Cal. 1943), said at 709:

> A consulate is, ordinarily, a building owned by the Government of the United States. And although it be not owned by the United States, it is a part of the territory of the United States of America.

In *Bowman*, *supra*, at 98-99, both public and *private* ships on the high seas were characterized as "constructively" a part of the territory of the United States. Subsection (3) is not framed in the language of conveyancing. The test,

s to property within or without the United States, is one f practical usage and dominion exercised over the embassy r other federal establishment by the United States govern- ient.

The much harder question is whether the third phrase of 7(3) (dealing with places acquired by the federal govern- ient with the consent of the states and thus presumably ithin the territorial boundaries of the United States) odifies and limits the more general coverage of the pre- eding two phrases. The meaning is not perfectly clear. Vor is the legislative history.[2] Such an interpretation is ot implausible, and, indeed, it is possible that when the tatute was enacted the attention of the Congress was not n the slightest focused on extraterritorial jurisdiction. 3ut if so, why the broad general language of phrases one nd two—wholly unnecessary to implement the establish- ient of forts, dockyards and other needful buildings with- n the states plainly accomplished by phrase three?

Where the power of the Congress is clear, and the langu- ge of exercise is broad, we perceive no duty to construe a tatute narrowly. The first two phrases connected by the onjunctive "and" relate to and modify each other. The esult is to create a jurisdictional category: lands reserved r acquired for the use of the United States and under its xclusive or concurrent jurisdiction. It is only the third hrase, separated from the first two by a comma and the isjunctive "or", that limits jurisdiction to places acquired (within the United States presumably) by the consent of tate legislatures. We think the third phrase is indepen- lent of and does not modify the first two, and so read, the entence describes two kinds of places or lands within the "special" jurisdiction of the United States.

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[2] *See e.g.*, 42 Cong. Rec. 590, 1186 (1909) (remarks of Senator Heyburn and Congressman Sherley).

We hold that 18 U.S.C. § 7(3) is a proper grant of "special" territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction. We further hold that 18 U.S.C. § 1112 is a specific grant of subject matter jurisdiction with respect to manslaughter committed at a place within the special maritime and territorial jurisdiction of the United States.

Venue

Venue, in cases of crimes committed outside any district, is controlled by 18 U.S.C. §3238,[3] which provides in part that venue shall be in the district within the United States where the offender "is arrested or first brought." The statute has a long history.[4] It was first enacted in 1790, amended in 1825, again in 1874, and most recently in 1963. In its original form, the statute used the word "apprehended." The 1825 version used the words "first apprehended." In the 1874 version the word "found" was substituted for the words "first apprehended," but in the latest reenactment, the Congress reverted to the original idea of restraint and substituted the word "arrested" for the word "found." The legislative history of the 1963

[3] 18 U.S.C. § 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

[4] *See* Orfield, *Venue in Federal Criminal Cases*, 17 U. Pitt. L. Rev. 375, 393-98 (1956).

version explains that "The term 'found' in most cases means 'arrested.' " 1963 U.S. Code Cong. & Ad. News 660.

The various versions of the statute have been construed time and again. *E.g.*, *United States* v. *Provoo*, 215 F.2d 531, 537 (2d Cir. 1954); *United States* v. *Townsend*, 219 F. 761, 762 (2d Cir. 1915). The cases seem to agree, whether construing the words "found," "apprehended," or "first apprehended," that the Congress had restraint in mind. We think the phrase in the current version of the statute that venue shall be in the district in which the offender "is arrested or is first brought" means simply "arrested"—*i.e.*, that venue is in that district within the United States where the offender is first restrained of his liberty in connection with the offense charged. Obviously, "first brought" could plausibly be interpreted to mean what it says, so that wherever an offender (traveling by air) touches down in the United States, that is the place where trial must be had. But it is settled otherwise. "First brought" within the context of the statute means first brought *in custody* with liberty restrained. *United States* v. *Ross*, 439 F.2d 1355, 1358 (9th Cir. 1971); *Provoo*, *supra*, at 537; *Chandler* v. *United States*, 171 F.2d 921, 927, 932-33 (1st Cir. 1948); *Kerr* v. *Shine*, 136 F. 61, 63-65 (9th Cir. 1905).

The commercial airplane in which Erdos returned to the United States was scheduled to make its initial landing in the United States at Dulles International Airport—located in the Eastern District of Virginia. Instead, it made an unscheduled intermediate stop in Boston, Massachusetts.

Erdos contends that the District of Massachusetts is the district with exclusive venue because that is the district into which he was "first brought." He would be correct but for the judicial gloss, to which we have adverted, that has long since been applied to the statute.

The district court found as a fact that Erdos was not in custody on the return flight to the United States, nor in

Boston, stating that "all the evidence was he was free to go where he wanted to," even when the plane landed at Dulles.[5] The district court, consequently, determined that Erdos was "first found" at Dulles when he was served with the complaint and summons upon his arrivel there. For reasons previously stated, we read "first found" as meaning arrested. But it does not matter, for the record is clear that, if not arrested at Dulles, Erdos was subsequently arrested at Alexandria, also within the jurisdiction of the district court.

Findings of fact by a district court in a criminal case may not be disturbed on appeal unless they are clearly erroneous. *Campbell* v. *United States*, 373 U.S. 487, 493 (1963); *United States* v. *Graves*, 428 F.2d 196, 200 (5th Cir. 1970). After carefully examining the record we believe there was ample evidence from which the district court could find that Erdos was *not* in custody within the meaning of 18 U.S.C. § 3238 when his flight landed in Boston and, therefore, that venue was appropriate in the Eastern District of Virginia since that was the district in which he was first arrested.

Cross-Examination

At trial Erdos admitted killing Leahy and pleaded insanity as his defense. In furtherance of his defense, Erdos called as witnesses four psychiatric nurses who had attend-

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[5] The following colloquy between counsel for Erdos and the district judge demonstrates agreement that Erdos's movements after his arrival at Dulles were not restrained.

> THE COURT: [T]hey claim when he landed he was never in custody, that they did give a summons, just like a parking ticket, to appear on a certain day, but he was not arrested, he was free to go where he wanted to.
>
> MR. MCDANIELS: That is correct.
>
> THE COURT: And he did go where he wanted to.
>
> MR. MCDANIELS: That is correct."

ed him during his hospitalization and two psychiatrists. In rebuttal the government called two court-appointed psychiatrists, both of whom testified on direct examination that Erdos was only feigning mental illness after he killed Leahy.

While cross-examining one of the court-appointed psychiatrists, counsel for Erdos attempted to question the witness from an apparently recognized psychiatric treatise. The district judge sustained the government's objections to the use of the psychiatric treatise after the witness said that he had "read portions of it . . . [but was] not familiar with the whole text."

There has been much progress in recent years toward expanding the "learned treatise" exception to the hearsay rule to allow liberal cross-examination of expert witnesses from respected texts.[6] This trend was recognized and approved by the Supreme Court in *Reilly* v. *Pinkus*, 338 U.S. 269, 275 (1949), and expressly adopted by this court in *Lawrence* v. *Nutter*, 203 F.2d 540 (4th Cir. 1953), at 543:

> We need go no further in the pending case than to hold that the attention of an expert may be called in the course of cross examination to statements in conflict with his testimony contained in relevant scientific works which he recognizes as authoritative. This holding accords . . . with the more liberal view taken in the recent cases . . . .

Before allowing cross-examination from a treatise, however, it must be established that the book is known by the witness and is a generally respected authority in the relevant field. *Reilly*, *supra*, at 275; *Lawrence*, *supra*, at 542.

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[6] *See* Proposed Rules of Evidence for United States Courts and Magistrates, R. 803(18), 12 Cr. L. 3011, 3021 (Nov. 20, 1972); 6 Wigmore on Evidence §§ 1690-1700 (3d ed. 1940).

Since the district court prevented counsel for Erdos from establishing the authenticity and authority of the book, we assume it to be a "learned treatise" for purposes of appeal. We hold it was error to restrict cross-examination from this text. But error alone is not sufficient to justify reversal. Erdos was given every opportunity during his trial to present evidence supporting his defense of insanity. He was allowed ample latitude both in the direct examination of his own numerous witnesses and on cross-examination of the court-appointed psychiatrists. We think the curtailing of the cross-examination of one witness from one particular treatise during a lengthy trial was not error so grave as to require reversal where extensive evidence was properly admitted on the issue in question. Erdos's rights were not substantially affected by this incorrect ruling, and we therefore disregard the error.[7]

AFFIRMED.

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[7] 28 U.S.C. § 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Fed. R. Crim. P. 52(a) provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

See Chapman v. California, 386 U.S. 18, 22 (1967).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1328

UNITED STATES OF AMERICA, *Appellee,*

v.

ALFRED ERDOS, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Order

After careful consideration and with the concurrence of Judge Haynsworth and Judge Widener, the petition for rehearing is denied. No member of the court having requested a poll on the suggestion for rehearing en banc, the petition for reconsideration en banc is also denied.

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge